
TITLE 326 AIR POLLUTION CONTROL DIVISION**SECOND NOTICE OF COMMENT PERIOD**

LSA Document #15-326

STARTUP, SHUTDOWN, AND MALFUNCTION (SSM) EMISSIONS**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to rules at [326 IAC 1-6](#) and [326 IAC 2-9-1\(h\)](#) concerning the treatment of excess emissions at certain industrial facilities during periods of startup, shutdown, or malfunction (SSM). IDEM seeks comment on the affected citations listed and any other provisions of Title 326 that may be affected by this rulemaking.

HISTORY

First Notice of Comment Period: September 30, 2015, Indiana Register (DIN: [20150930-IR-326150326FNA](#)).

CITATIONS AFFECTED: [326 IAC 1-6-1](#); [326 IAC 1-6-2](#); [326 IAC 1-6-4](#); [326 IAC 1-6-5](#); [326 IAC 1-6-6](#); [326 IAC 2-9-1](#).

AUTHORITY: [IC 13-14-8](#); [IC 13-17-3](#).

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING**Basic Purpose and Background**

The United States Environmental Protection Agency (U.S. EPA) published findings in the Federal Register (FR) on June 12, 2015 (80 FR 33839) concerning inadequacies to startup, shutdown, and malfunction (SSM) provisions in state rules. This action, effective on May 22, 2015, directs thirty-six (36) states, including Indiana, to correct specific provisions in State Implementation Plans (SIPs) concerning the treatment of excess emissions that occur at certain industrial facilities during periods of SSM to be consistent with the Clean Air Act (CAA) and with U.S. EPA's updated SSM policy. Section 302(k) of the CAA requires SIPs to contain emission limitations that "limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." However, the conditions listed in [326 IAC 1-6-4\(a\)](#) would allow an exemption for noncompliance with emission limitations during certain malfunction events. Owners and operators of facilities that are required to obtain a permit under [326 IAC 2-5.1](#) or [326 IAC 2-6.1](#), generally those sources requiring a construction permit after December 25, 1998, except for exemptions as listed in the rule, will be affected by this rulemaking. States are required to submit a revision of the inadequate SSM provisions for approval into the SIP by November 22, 2016.

IDEM is proposing to amend state rules to address SSM deficiencies. The preventive maintenance plan provision at [326 IAC 1-6-3](#) will not be affected by this rulemaking because it does not pertain to a malfunction. Therefore, it is not included in this rulemaking. The language at [326 IAC 2-9-1\(h\)](#) will be changed because it references [326 IAC 1-6](#) in its requirements and states that if exceedances are due to a malfunction, then the provisions of [326 IAC 1-6](#) shall apply.

IDEM seeks comment on the affected citations listed, including suggestions for specific rule language, any other provisions of Title 326 that may be affected by this rulemaking, and alternative ways to achieve the purpose of the rulemaking.

[IC 13-14-9-4](#) Identification of Restrictions and Requirements Not Imposed under Federal Law

No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law.

Potential Fiscal Impact

There is no fiscal impact on affected sources of the draft rule amendments for this rulemaking.

Public Participation and Work Group Information

At this time, no work group is planned for the rulemaking. If you feel that a work group or other informal discussion on the rule is appropriate, please contact Jack Harmon, Rules Development Branch, Office of Legal Counsel at (317) 234-9535 or (800) 451-6027 (in Indiana).

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD

IDEM requested public comment from September 30, 2015, through October 30, 2015, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language. IDEM received comments from the following parties by the comment period deadline:

Indiana Energy Association (IEA)

Indiana Chamber of Commerce (IN Chamber)

Indiana Manufacturers Association (IMA)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Generally, the provisions of [326 IAC 1-6-4\(a\)](#) and the relevant provisions of [326 IAC 2-9-1\(h\)](#) do not apply to the large electric generating facilities represented by Indiana Energy Association (IEA) because these facilities are regulated and permitted under the provisions of Title V that supersede [326 IAC 1-6-4\(a\)](#). The U.S. EPA's revised policy on SSM is overreaching and does not provide appropriate flexibility for states in their primary role to regulate sources to assure attainment of air quality standards. Finally, U.S. EPA's recent policy change in this matter may require IDEM to address other provisions of the Indiana SIP in the future; therefore, it is important that the issues be addressed effectively at this time.

IDEM should work with affected industrial stakeholders to retain and revise the rule to incorporate as much flexibility as possible to assure sources having proper emission controls are not subject to rigid and inappropriate enforcement against unavoidable malfunctions. At a minimum, IDEM should retain provisions which define how a source's operation will be evaluated to demonstrate that the source has taken reasonable actions to prevent and mitigate malfunctions. IDEM should consider how an affirmative defense may be allowed as part of the state's enforcement authority based on Clean Air Act provisions and certain legal precedents. (IEA)

We support common sense environmental regulations that recognize that excess emissions from startup, shutdown and malfunction (SSM) events are often unavoidable. Startup and shutdown activities are transition periods that are usually minimized and are not reflective of a normal operation of the source. Malfunction periods, despite preventive measures regularly taken, are inherently unpredictable, and, therefore, sources should be protected from frivolous allegations of non-compliance based on these transitional periods of startup and shutdown. (IN Chamber) (IMA)

Response: IDEM appreciates the participation in this rulemaking by providing comments. IDEM agrees that this rulemaking is generally not relevant to the facilities represented within this comment. The U.S. EPA's mandate was specific because the current rule violates the Clean Air Act (CAA), and could jeopardize Indiana's approval to implement its permitting program; therefore, IDEM must address this SIP call. IDEM has drafted a rule change to address the U.S. EPA's concerns, but does not plan to form a work group at this time because the flexibility requested in the comment conflicts with the federal requirements to remove the provision. IDEM cannot control U.S. EPA's possible future policies or rulemaking processes, but will work with all stakeholders on future rulemakings where there is flexibility to the state in developing new or amended rules.

Comment: There should be a basis for mitigating factors for periods of malfunction, and affirmative defense for periods of SSM events. Based on NRDC vs EPA, and Luminant Generation Co. vs EPA, IDEM has the authority to retain provisions in the Indiana rules that provides the option to establish mitigating factors or affirmative defense for SSM events. Therefore, IDEM should convene a formal work group with stakeholders to develop amendments to the rules. (IN Chamber) (IMA)

Response: In proposing and issuing the SSM SIP call, U.S. EPA acknowledged that NRDC vs EPA, Luminant Generation Co. vs EPA, and several other cases either upheld or did not question U.S. EPA's authority to approve SIP provisions providing an affirmative defense for unplanned SSM events. (See 79 FR 55920, Sep. 17, 2014; and 80 FR 33840, Jun. 12, 2015). In the SSM SIP call, U.S. EPA expressly "revised its prior interpretation" of affirmative defenses for unplanned SSM events (80 FR 33845). The legality of U.S. EPA's revised interpretation is currently under review by the D.C. Circuit Court of Appeals in a consolidated case involving several state and industry parties. (Florida v. EPA, Case No. 15-1267; D.C. Cir. Aug. 11, 2015). Because the D.C. Circuit Court of Appeals has not stayed the SSM SIP call during the pendency of the case, IDEM must address the SSM SIP call within the required timeframes. U.S. EPA's revised interpretation in the SSM SIP call does not allow IDEM to retain affirmative defenses for SSM events. Should the resolution of the court case affect this interpretation, IDEM will revisit the requirements at that time.

REQUEST FOR PUBLIC COMMENTS

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the draft rule. Comments may be submitted in one of the following ways:

(1) By mail or common carrier to the following address:

LSA Document #15-326 Startup, Shutdown, and Malfunction (SSM) Emissions
Jack Harmon
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
Indiana Government Center North
100 North Senate Avenue
Indianapolis, IN 46204-2251

(2) By facsimile to (317) 233-5970. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 232-8922.

(3) By electronic mail to jaharmon@idem.in.gov. To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments**

will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.

(4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

COMMENT PERIOD DEADLINE

All comments must be postmarked, faxed, or time stamped not later than April 29, 2016. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Jack Harmon, Rules Development Branch, Office of Legal Counsel, (317) 234-9535 or (800) 451-6027 (in Indiana).

DRAFT RULE

SECTION 1. [326 IAC 1-6-1](#) IS AMENDED TO READ AS FOLLOWS:

[326 IAC 1-6-1](#) Applicability

Authority: [IC 13-14-8](#); [IC 13-17-3-4](#); [IC 13-17-3-11](#)

Affected: [IC 13-15](#); [IC 13-17](#)

Sec. 1. This rule applies to the owner or operator of any ~~facility~~ **source** required to obtain a permit under [326 IAC 2-5.1](#) or [326 IAC 2-6.1](#).

(Air Pollution Control Division; [326 IAC 1-6-1](#); filed Mar 10, 1988, 1:20 p.m.: 11 IR 2380; filed May 25, 1994, 11:00 a.m.: 17 IR 2238; filed Nov 25, 1998, 12:13 p.m.: 22 IR 980)

SECTION 2. [326 IAC 1-6-2](#) IS AMENDED TO READ AS FOLLOWS:

[326 IAC 1-6-2](#) Records; notice of malfunction

Authority: [IC 13-17-3-4](#); [IC 13-14-8-2](#)

Affected: [IC 13-15](#); [IC 13-17](#)

Sec. 2. (a) **The owner or operator must keep** a record ~~shall be kept~~ of all malfunctions, ~~including~~ startups, or shutdowns of any ~~facility~~ **emission unit** or emission control equipment ~~which that~~ result in violations of:

- (1) applicable air pollution control regulations; or
- (2) applicable emission limitations. ~~and such~~.

(b) ~~The records shall~~ **must** be retained for a period of three (3) years and ~~shall~~ be made available to the commissioner upon request.

(c) When a malfunction of any ~~facility~~ **emission unit** or emission control equipment occurs ~~which that~~ lasts more than one (1) hour, ~~said the~~ condition **shall must** be reported to the commissioner or ~~his the~~ **commissioner's** appointed representative **as follows:**

(1) Notification ~~shall must~~ be made by telephone or ~~telegraph~~, **other electronic means** as soon as practicable, but in no event later than four (4) daytime business hours after the beginning of ~~said the~~ occurrence.

(2) Failure to report a malfunction of any **emission unit** or emission control equipment subject to the requirements of this rule (~~326 IAC 1-6~~) shall constitute a violation of this rule (~~326 IAC 1-6~~) and any other applicable rules.

(3) Information of the scope and expected duration of the malfunction ~~shall must~~ be provided including the following:

- (4) (A) Identification of the specific emission control device to be taken out of service, ~~as well as and~~ the location and permit number of ~~such the~~ equipment.
- (2) (B) The expected length of time that the emission control equipment will be out of service.
- (3) (C) The nature and quantity of emissions of air contaminants likely to occur during the shutdown period.
- (4) (D) Any measures ~~such as the use of off-shift labor on equipment~~ that will be **utilized used** to minimize the length of the shutdown period, **such as the use of off-shift labor on equipment.**

- ~~(5) Any reasons that shutdown of the facility operation during the maintenance period would be impossible for the following reason:~~
- ~~(A) continued operation is required to provide essential services, provided, however, that continued operation solely for the economic benefit of the owner or operator shall not be sufficient reason;~~
 - ~~(B) continued operation is necessary to prevent injury to persons or severe damage to equipment.~~
 - ~~(6) (E) A demonstration that interim control measures have reduced or will reduce emissions from the facility emission unit during the shutdown period.~~

(Air Pollution Control Division; [326 IAC 1-6-2](#); filed Mar 10, 1988, 1:20 p.m.: 11 IR 2380; errata, 11 IR 2632)

SECTION 3. [326 IAC 1-6-4](#) IS AMENDED TO READ AS FOLLOWS:

[326 IAC 1-6-4](#) Operating conditions

Authority: [IC 13-14-8](#); [IC 13-17-3](#)

Affected: [IC 13-15](#); [IC 13-17](#)

Sec. 4. (a) ~~Facility~~ **Source** owners or operators shall ~~be responsible for operating~~ **operate** and maintaining **maintain** all emission control equipment and combustion or process equipment or processes in compliance with all applicable rules. ~~Emissions temporarily exceeding the standards which are due to malfunctions of facilities or emission control equipment shall not be considered a violation of the rules provided the source demonstrates that:~~

- ~~(1) All reasonable measures were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the allowable limits, including the use of off-shift and over-time labor, if necessary.~~
- ~~(2) All possible steps were taken to minimize the impact of the excessive emissions on ambient air quality which may include but not be limited to curtailment of operation and/or shutdown of the facility.~~
- ~~(3) Malfunctions have not exceeded five percent (5%), as a guideline, of the normal operational time of the facility.~~
- ~~(4) The malfunction is not due to the negligence of the operator.~~

~~(b) No facility shall~~ **An emission unit must not** be operated unless the air pollution control **device or** devices and measures are also in operation simultaneously and are not bypassed. ~~unless necessary to prevent damage to equipment or injury to persons or unless there is a malfunction and the requirements set forth in subsection (a) of this section are met.~~

~~(c) Excessive emissions shall~~ **must** be brought into compliance with all practicable speed, and appropriate action, including those set forth above, **actions must be taken to:**

- ~~(1) correct the conditions causing such~~ **the** emissions to exceed applicable limits; ~~to~~
- ~~(2) reduce the frequency of occurrence of such~~ **the** conditions; ~~to~~
- ~~(3) minimize the amount by which said~~ **the** limits are exceeded; and ~~to~~
- ~~(4) reduce the length of time for which said~~ **the** limits are exceeded.

These actions ~~shall~~ **must** be initiated as expeditiously as practicable.

(Air Pollution Control Division; [326 IAC 1-6-4](#); filed Mar 10, 1988, 1:20 p.m.: 11 IR 2381)

SECTION 4. [326 IAC 1-6-5](#) IS AMENDED TO READ AS FOLLOWS:

[326 IAC 1-6-5](#) Excessive malfunctions; department actions

Authority: [IC 13-14-8](#); [IC 13-17-3](#)

Affected: [IC 13-15](#); [IC 13-17](#)

Sec. 5. The commissioner may consider the following guidance in determining cases of excessive malfunctions: ~~where~~

- ~~(1) If records show that repeated malfunctions exceed five percent (5%) as a guideline, of the normal operational time for any one~~ **(1) control device or combustion or process equipment, the commissioner may require that the maintenance program be improved or that the defective or faulty equipment or emission control device be replaced.**
- ~~(2) The commissioner may require curtailment of operation of a facility~~ **an emission unit if the owner or operator of the facility or emission unit and emission control device cannot demonstrate that for the most recent twelve (12) month period the facility and/or emission unit and the emission control device has have**

operated in compliance with the applicable rules at least ninety-five percent (95%) of the operating time of said the equipment.

(Air Pollution Control Division; [326 IAC 1-6-5](#); filed Mar 10, 1988, 1:20 p.m.: 11 IR 2381)

SECTION 5. [326 IAC 1-6-6](#) IS AMENDED TO READ AS FOLLOWS:

[326 IAC 1-6-6](#) Malfunction emission reduction program

Authority: [IC 13-14-8](#); [IC 13-17-3](#)

Affected: [IC 13-15](#); [IC 13-17](#)

Sec. 6. (a) Any owner or operator of a facility which has the potential to emit concentration in excess of the concentrations stated in an emission unit that is required to obtain a permit under [326 IAC 1-6-1](#) shall submit by January 19, 1980, or a malfunction emission reduction program within one hundred eighty (180) days after a new source emission unit commences operation. a malfunction emission reduction program. Said

(b) The program shall **must** include: but not be limited to

(1) the normal operating emission rate; and

(2) the program proposed actions that will be taken to reduce emissions in the event of a malfunction to an emission rate which that will not contribute to the cause of the violation of the ambient air quality standards established in [326 IAC 1-3](#).

(c) The program shall **must** be based on the:

(1) best estimates of type and number of startups, shutdowns, and malfunctions experienced during normal operation of the facility emission unit or emission control device; and the

(2) scope and duration of such the conditions. Said

(d) The program may be is subject to review and approval by the commissioner.

(Air Pollution Control Division; [326 IAC 1-6-6](#); filed Mar 10, 1988, 1:20 p.m.: 11 IR 2382)

SECTION 6. [326 IAC 2-9-1](#) IS AMENDED TO READ AS FOLLOWS:

[326 IAC 2-9-1](#) General provisions

Authority: [IC 13-15-2](#); [IC 13-17-3-4](#); [IC 13-17-3-11](#)

Affected: [IC 13-11-2](#); [IC 13-14-8](#)

Sec. 1. (a) The definitions in [IC 13-11-2](#), [326 IAC 1-2](#), [326 IAC 2-7](#), and [326 IAC 2-8](#) apply throughout this rule.

(b) A source may limit its potential to emit by complying with the specific restrictions and conditions listed in this rule. A source electing to comply with this rule shall apply to the commissioner for a source specific operating agreement. A source issued a source specific operating agreement under this rule is not subject to [326 IAC 2-6.1](#) unless otherwise required by state, federal, or local law. A source issued a source specific operating agreement pursuant to this rule is not subject to [326 IAC 2-5.1](#) or [326 IAC 2-7](#) provided the source specific operating agreement limits the source's potential to emit below the applicability thresholds for [326 IAC 2-5.1](#) or [326 IAC 2-7](#). Until the commissioner has issued an operating agreement for a source that would otherwise be subject to [326 IAC 2-5.1](#), [326 IAC 2-6.1](#), [326 IAC 2-7](#), or [326 IAC 2-8](#), the source is subject to all applicable requirements of those rules. A source complying with this rule may at any time apply for a permit under [326 IAC 2-5.1](#), [326 IAC 2-6.1](#), [326 IAC 2-7](#), or [326 IAC 2-8](#).

(c) The owner or operator of a source seeking an operating agreement shall **must** submit a request to the commissioner. The request shall **must** include all information necessary for the commissioner to verify that the source meets the applicable restrictions and conditions specified in this rule, including the following:

(1) Identifying information.

(2) A description of the following:

(A) The source's:

- (i) nature;
- (ii) location;
- (iii) design capacity; and
- (iv) typical operating schedule.

(B) The nature and amount of regulated pollutants emitted in the prior twelve (12) months.

(C) How the source will comply with the applicable restrictions and conditions specified in this rule.

(3) Certification by a responsible official that the source shall comply with all applicable conditions of this rule. The request ~~shall~~ **must** be signed by a responsible official who ~~shall certify~~ **certifies** that the information contained therein is accurate, true, and complete. Any applicable fees specified in this rule ~~shall~~ **must** be submitted with the request.

(d) If the commissioner determines that the source meets the applicable restrictions and conditions specified in any applicable section of this rule, the commissioner shall issue the operating agreement. The operating agreement ~~shall~~ **must**:

- (1) specify the source specific restrictions and conditions applicable to the source; and
- (2) establish specific monitoring and reporting requirements.

Any source for which the commissioner has issued a source specific operating agreement shall provide annual notice to the commissioner stating that the source is in operation and certifying that its operations are in compliance with applicable sections as specified in the operating agreement. This notice ~~shall~~ **must** be submitted no later than January 30 of each year.

(e) Before a source subject to this section modifies its operations in ~~such~~ a way that it will no longer comply with the applicable restrictions and conditions of its source specific operating agreement, it shall obtain the appropriate approval from the commissioner under the following:

- (1) [326 IAC 2-2](#).
- (2) [326 IAC 2-3](#).
- (3) [326 IAC 2-4.1](#).
- (4) [326 IAC 2-5.1](#).
- (5) [326 IAC 2-6.1](#).
- (6) [326 IAC 2-7](#).
- (7) [326 IAC 2-8](#).

(f) Any records required to be kept by a source in accordance with any section of this rule ~~shall~~ **must** be:

- (1) maintained at the site for at least five (5) years; and
- (2) made available for inspection by the department upon request.

(g) A source may apply for up to four (4) different types of source specific operating agreements contained in this rule provided allowable emissions or potential to emit for any regulated air pollutant, as limited under the source specific operating agreements, do not exceed major source levels when aggregated. A source may combine up to four (4) types of source specific operating agreements in one (1) application. Upon billing, the applicant shall pay the applicable fee in accordance with [326 IAC 2-1.1-7](#)(g).

(h) Any source subject to this rule shall report to the department, in writing, any exceedance of a requirement contained in this rule or its operating agreement within one (1) week of its occurrence. The exceedance report ~~shall~~ **must** include information on the actions taken to correct the exceedance, including measures to reduce emissions, in order to comply with the established limits. ~~If an exceedance is the result of a malfunction, then the provisions of [326 IAC 1-6](#) apply.~~

(i) This rule does not affect a source's requirement to comply with provisions of any other applicable federal, state, or local requirement, except as specifically provided.

(j) Revocation of the operating agreement and a source becoming subject to the applicable requirements of a major source may result from noncompliance with any:

- (1) applicable provision of this rule; or
- (2) requirement contained in a source's operating agreement.

(Air Pollution Control Division; [326 IAC 2-9-1](#); filed May 25, 1994, 11:00 a.m.: 17 IR 2280; filed Apr 1, 1996, 9:00 a.m.: 19 IR 1757; filed May 7, 1997, 4:00 p.m.: 20 IR 2303; filed Nov 25, 1998, 12:13 p.m.: 22 IR 1059; errata filed

May 12, 1999, 11:23 a.m.: 22 IR 3108; readopted filed Oct 22, 2004, 10:35 a.m.: 28 IR 801; filed Sep 28, 2011, 10:56 a.m.: [20111026-IR-326070286FRA](#))

[Notice of Public Hearing](#)

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